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Blankenship v. Washington Trust Bank Appellant's Brief Dckt. 38426

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TERESA R. BLANKENSHIP)
)
 Petitioner,)
)
 v.)
)
 WASHINGTON TRUST BANK,)
)
 Respondent-Respondent on Appeal.)
 _____)
)
 WILLIAM MICHAEL BOWMAN and)
 ERIC BOWMAN,)
)
 Intervenors-Appellants.)
 _____)

Supreme Court Docket No. 38426-2011
 Bonner County Case No. 2007-572

APPELLANTS' BRIEF

Appealed from the District Court of the First Judicial District
 of the State of Idaho, in and for the County of Bonner

HONORABLE JOHN T. MITCHELL, District Judge presiding.

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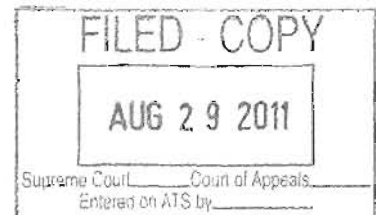


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STATEMENT OF THE CASE

(i) **Nature of the Case.**

This dispute relates to whether or not actions taken by Washington Trust Bank as the Trustee of a testamentary trust were in violation of the terms of the trust or Idaho law.

(ii) **The Course of Proceedings.**

A Petition for Removal of Trustee and Preliminary Injunction was filed by Teresa R. Blankenship, as one of the beneficiaries against Washington Trust Bank.¹ The Petition was subsequently amended seeking the Removal of Trustee, Issuance of a Preliminary Injunction and a Complaint for Damages.² Two of the other beneficiaries namely, Michael Bowman and Eric Bowman intervened seeking to prevent Washington Trust Bank from selling or encumbering Trust property and also seeking to quiet title against the lien of the Deed of Trust filed by Washington Trust Bank.³

The Honorable John T. Mitchell granted Partial Summary Judgment in favor of Washington Trust Bank holding that the advancement of funds to Ryan Bowman's Trust and the subsequent preparation of a Promissory Note and the recording of a Deed of Trust against trust property was

¹R., Vol.1, p. 23-26

²R., Vol. 1, p. 158-162

³R., Vol. 2, p. 296-300

authorized by the Last Will and Testament and Idaho law.⁴

The surviving issues from the Summary Judgment proceeding were subsequently either settled or dismissed and a Final Judgment dismissing all claims was filed November 10, 2010.⁵

(iii) **Statement of Facts.**

The Last Will and Testament of Althea Lorraine Bowman directed that her residuary estate was to be held in trust and divided into equal shares, one share for each of her four (4) children namely, William Michael Bowman, Eric Lane Bowman, Ryan Arthur Bowman and Teresa Renae Bowman Blankenship.⁶ Washington Trust Bank was identified as a successor trustee and was serving in that capacity at all times material to this cause of action.⁷ The primary assets comprising the Trust were commercial properties located in and around Sandpoint, Idaho, which were generating rental income for the Trust.⁸ Pursuant to the terms of the Trust, the Trustee was to pay to the children all of the current net income and the Trustee also had the ability to pay so much of the

⁴Tr., p. 63, L. 8-12; See also Order Granting Summary Judgment R., Vol. 3, p. 425-429.

⁵R., Vol. 3, p. 576-579.

⁶See the Last Will and Testament of Althea Lorraine Bowman attached to Affidavit of Susan Kuzma, filed January 14, 2008.

⁷Affidavit of Susan Kuzma, filed January 14, 2008.

⁸See Teresa R. Blankenship's Answer to Interrogatory No. 13 attached as Exhibit "A" to the Affidavit of Peter Smith, filed January 29, 2009.

principal as the Trustee determined to be reasonable for support, health, maintenance and education.⁹ During administration of the Trust, Washington Trust Bank advanced significantly more dollars to Ryan Bowman than was supported by his “share” of the trust income from the commercial properties comprising the Trust.¹⁰ The dollars advanced to Ryan over time exceeded his portion of the income by One Hundred, Forty Seven Thousand, Five Hundred, Fifty Nine and 24 (\$147,559,24) Dollars.¹¹ During Spring of 2005, the three other beneficiaries became very concerned with the inappropriate advances being made and notified Washington Trust Bank that they were objecting to any further advancements to Ryan and insisted that any further loans would need to be approved in writing by the other beneficiaries.¹² Despite the written request, Washington Trust Bank continued to advance funds to Ryan Bowman which exceeded his portion of the net income, and Washington Trust Bank began discussing the possibility of selling the commercial property in order to provide the necessary funds to reimburse the bank for the over-advances.¹³ Appraisals were completed and written

⁹Article IV.c.1. and c.2 of Last Will and Testament of Althea Lorraine Bowman, *Id.*

¹⁰Deposition of Susan Kuzma p. 35, L.2-25; p. 36, L. 1-20, attached to Affidavit of Peter Smith filed January 29, 2009.

¹¹See Promissory Note attached as Exhibit “1” to Affidavit of Susan J. Kuzma filed March 26, 2009.

¹² Deposition of Susan Kuzma, p. 30, L. 3-20, attached to Affidavit of Peter Smith filed February 29, 2009.

¹³Deposition of Susan Kuzma, p. 35, L.4-14, attached to Affidavit of Peter Smith filed January 29, 2009; see also Petitioners Response to Interrogatories #5, 13, 18 & 20 attached to

notification of intention to sell real property was provided to the beneficiaries by Jim Black, an attorney for Washington Trust Bank.¹⁴ Finally, in April, 2007, Teresa Blankenship brought suit against Washington Trust Bank seeking their removal as Trustee and also seeking a preliminary injunction prohibiting the sale of real property.¹⁵ Shortly after the Petition for Removal and Preliminary Injunction was filed, Washington Trust Bank, acting as Trustee under the Althea Lorraine Bowman Trust for the benefit of Ryan Bowman, signed a Promissory Note in favor of Washington Trust Bank, Private Banking, in the sum of One Hundred, Forty Seven Thousand, Five Hundred, Fifty Nine and 24/100 (\$147,559.24) Dollars and secured that Promissory Note by signing a Deed of Trust encumbering the commercial real property owned by the Althea Lorraine Bowman Testamentary Trust.¹⁶ Following the recording of the Deed of Trust, William Michael Bowman and Eric Bowman intervened in the case seeking to not only enjoin the sale of the property, but to quiet title and set aside the Deed of Trust.¹⁷

Affidavit of Peter Smith filed February 29, 2009.

¹⁴Letter from Jim Black attached to Affidavit of Teresa Blankenship filed April 16, 2008.

¹⁵Petition for Removal of Trustee and Preliminary Injunction (R.Vol.1, p.23-26)

¹⁶Exhibits 1 and 2 to Affidavit of Susan Kuzma filed March 26, 2009

¹⁷See Complaint of Intervenor (R. Vol.2, p. 296-300)

ISSUE PRESENTED ON APPEAL

Was it error for the District Court to grant summary judgment in favor of Washington Trust Bank ruling that the advance of funds to the Ryan Bowman Trust and the execution of a Promissory Note and Deed of Trust which was recorded against real property owned by the Althea Lorraine Bowman Trust was authorized by the Last Will and Testament and Idaho law.

ARGUMENT

A.

SUMMARY JUDGMENT STANDARD

Pursuant to Rule 56(c), I.R.C.P., summary judgment shall be granted if the “pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The nonmoving party is to be given the benefit of all favorable inferences which reasonably might be drawn from the evidence and all doubts are to be resolved against the moving party. Farm Credit Bank of Spokane v. Stevenson, 125 Idaho 270, 272, 869 P.2d 1365 (1994). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, summary judgment must be denied. Martinez v. ICRMP, 134 Idaho 247, 249, 999, P.2d 902 (2000).

An issue is “genuine” for summary judgment purposes when there is sufficient evidence supporting a claimed factual dispute to require a jury or judge to resolve parties’ differing versions

of truth at trial or when evidence is such that a reasonable jury could return a verdict for the nonmoving party. Podolan v. Aetna Life Insurance Co., 909 Fed. Sup. 1378(d). Idaho (1995). In considering a summary judgment motion, it is not the function of the trial court to weigh the evidence. Jones v. Runft, Leroy, Coffin & Matthews, Chtd., 25 Idaho 607, 873 P.2d 861 (1994).

When the Appellate Court reviews a trial court's decision on summary judgment, it employs the same standard as that employed by the trial court when originally ruling on the motion. Kolln v. St. Lukes Regional Medical Center, 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997), citing Thompson v. Idaho Insurance Agency, Inc., 126 Idaho 527,529, 887 P.2d 1034, 1036 (1994).

B.

THE DISTRICT COURT ERRED IN RULING AS A MATTER OF LAW THAT THE ACTIONS TAKEN BY WASHINGTON TRUST BANK WERE AUTHORIZED UNDER THE LAST WILL AND TESTAMENT AND DID NOT VIOLATE THE FIDUCIARY DUTIES OWED UNDER IDAHO LAW.

I.

WASHINGTON TRUST BANK OWED FIDUCIARY DUTIES TO ALL BENEFICIARIES

Washington Trust Bank, as the successor Trustee of the testamentary trust established by the Last Will and Testament of Althea Lorraine Bowman, owed a fiduciary obligation to all four of the beneficiaries. Not only does that fiduciary obligation arise by Common Law, Idaho has adopted various statutes which make it clear that a Trustee of an express trust owes fiduciary duties to the beneficiaries.

2.

**FIDUCIARY DUTIES PURSUANT TO
THE UNIFORM PRUDENT INVESTOR ACT**

The Uniform Prudent Investor Act (I.C. §68-501 et seq.) became effective July 1, 1997, and applies to trusts existing on and created after its effective date. I.C. §68-511. Section 68-501(1) sets forth the general purpose of the Act and provides:

“A trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rules set forth in this Act.”

The statute then goes on to identify specific obligations and responsibilities that a trustee owes to its beneficiaries. The trusts established by the Last Will and Testament of Althea Lorraine Bowman would be subject to the Uniform Prudent Investor Act.

(a) Standard of Care.

I. C. §68-502 addresses the standard of care and in subpart (1) provides that a “trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust.” In satisfying this standard, the “trustee shall exercise reasonable care, skill and caution...and (6) a trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.” In this instance, Washington Trust Bank must exercise its powers using not only reasonable care, skill and caution, but also has

a duty to use its special skills as a commercial trust department.

I.C. §68-502(3) identifies circumstances that a trustee **shall** consider in managing trust assets:

- (a) General economic conditions;
- (b) The possible affect of inflation or deflation;
- (c) The expected tax consequence of investment decisions or strategy;
- (d) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property and real property;
- (e) The expected total return from income and appreciation of capital;
- (f) Other resources of the beneficiary;
- (g) Needs for liquidity, regularity of income and preservation of appreciation of capital; and
- (h) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

The factors enunciated under I.C. §68-502(3) were required to be considered by Washington Trust Bank when it was considering the sale of the real property in order to obtain repayment of the monies loaned to the Ryan Bowman Trust. Those factors were also required to have been considered when making the decision to execute the promissory note and secure it with a deed of trust against the undivided interest in the trust property. While there was some evidence introduced that the Bank considered the sale of real property in order to provide for liquidity, there are genuine issues of material fact remaining as to whether or not it considered general economic conditions, tax consequences associated with sale of the property, whether or not the real property provided a special

relationship or special value to the trust or to one or more of the beneficiaries of the trust. I.C. §68-502(3).

(b) **Duty of Loyalty.**

Another trustee obligation set forth by the Uniform Prudent Investor Act can be found at I.C. §68-505, which is known as the “Duty of Loyalty”. This provision provides:

“A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.”

While there is very little case law in Idaho that has interpreted the duty of loyalty, the Official Comment does provide guidance in application of the rule and provides:

“The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries, as opposed to acting for the trustee’s own interest or that of third parties.”

Courts have consistently held that the Duty of Loyalty deserves uncompromising rigidity which is especially true in the case of a trust where a trustee has a large advantage over the beneficiary. There is a classic ruling by Judge Cardozo on the principle of fiduciary loyalty in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928):

Many forms of conduct permissible in a workaday world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior. As to this there has been developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity

when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court.

(c) **Duty of Impartiality.**

Where there is more than one beneficiary, another duty owed by a trustee under the statutory requirements of the Uniform Prudent Investor Act is the “Duty of Impartiality” which is set forth at I.C. §68-506 and provides:

“If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.”

Again, the Official Comment is helpful in understanding how this Code section applies to a trustee’s fiduciary obligations to its beneficiaries:

“The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.”

The Duty of Loyalty, as well as the Duty of Impartiality are applicable to all duties of the trustee. In the case at bar, the fiduciary duties owed to all four beneficiaries are important:

- (i) In the making or retention of investments;
- (ii) In the management of real property or personal property held in trust;
- (iii) In the allocation of receipts and expenditures between principal and

- income accounts, especially when the fiduciary has discretion in the making of adjustments;
- (iv) In decisions concerning discretionary distributions to one or more beneficiaries;
 - (v) In controversies among beneficiaries concerning their rights and beneficial interest; and
 - (vi) In decisions concerning the sale or mortgage of properties benefitting the trust.

These issues were raised in the amended petition,¹⁸ the Complaint of Intervenors,¹⁹ Petitioner's Responses to Interrogatories,²⁰ and the deposition of Susan Kuzma.²¹ Each of those determinations are question of fact which preclude the entry of summary judgment. Bushi v. Sage Healthcare, PLC, 146 Idaho 764, 203 P.3d 694 (2009).

3.

WHETHER A FIDUCIARY DUTY WAS BREACHED IS A QUESTION OF FACT.

In order to establish a claim for breach of fiduciary duty, a plaintiff must establish that defendants owed plaintiff a fiduciary duty and that the fiduciary was breached. Bushi v. Sage Healthcare, PLC, 146 Idaho 764, 203 P.3d 694 (2009), citing Tolley v. THI Co., 140 Idaho 253, 261,

¹⁸R., Vol. 1, p. 158-162

¹⁹R. Vol. 2, p. 296-300

²⁰See Teresa R. Blankenship's Answers to Interrogatories attached as Exhibit "A" to the Affidavit of Peter Smith, filed January 29, 2009.

²¹Deposition of Susan Kuzma p. 22, 23, 24, 30, 35 and 47, attached to Affidavit of Peter Smith, filed January 29, 2009.

92 P.3d 503, 511 (2004). Not only under Common Law, but under the statutory provisions identified under the Uniform Prudent Investor Act, it is clear that Washington Trust Bank, as the successor trustee to the Althea Lorraine Bowman Testamentary Trust, owed fiduciary duties to each of the four beneficiaries.

By Common Law and Statute, the first prong for establishing that Washington Trust Bank owed a fiduciary duty to each of the beneficiaries pursuant to Bushi, *Id.* has been met. The second prong of whether the fiduciary duty has been breached is a question of fact that precludes entry of summary judgment. Bushi v. Sage Healthcare, PLC., *Id.* citing First Bank and Trust of Idaho v. Jones, 111 Idaho 481, 484, 725 P.2d 186, 189 (Ct.App.1986). When Washington Trust Bank made the decision to sell various parcels of real property, did it consider the factors set forth under I.C. §68-502? Did Washington Trust Bank consider only the interest of the beneficiaries when it made its decision to prepare a promissory note in the amount of \$147,559.24; when it made the decision to set the interest rate at 8.25%; or when it established that the final payment was to be due on July 25, 2016? And, finally, did it breach its duties of Loyalty and Impartiality when it recorded a deed of trust thereby encumbering not only Ryan Bowman's interest, but the undivided interest of all the other beneficiaries in the underlying real property?

Appellants are to be given the benefit of all favorable inferences which reasonably might be drawn from the evidence and all doubts are to be resolved against WTB. Farm Credit Bank of Spokane v. Stevenson, 125 Idaho 270, 272, 869 P.2d 1365 (1994). See also Bushi v. Sage

Healthcare, PLC, 146 Idaho 764, P.3d 694 (2009). A reasonable inference from the evidence presented is that Washington Trust Bank significantly exceeded reasonable and prudent actions by continuing to advance monies to Ryan Bowman way beyond his portion of the income being generated by the assets and after being requested by the other beneficiaries to stop advancing monies in excess of normal distribution. It is also reasonable to infer that Washington Trust Bank made the decision to sell the commercial property in order to repay the amounts that they improperly advanced. At the time the decision to sell property was made, they were no longer acting solely in the best interest of the beneficiaries as required by I.C. §68-505 and §68-506, but were acting in the best interest of Washington Trust Bank in order to repay the monies owed by Ryan. This lawsuit was then initiated to enjoin Washington Trust Bank from selling property. Four (4) months after the litigation was commenced Washington Trust Bank breaches its fiduciary obligations to the beneficiaries and not only executes a formal promissory note but encumbers the commercial properties of the Althea Lorraine Bowman Testamentary Trust with a deed of trust issued in favor of Washington Trust Bank's Private Banking Division.

Washington Trust Bank has taken the position that they do not have the power to force sale of the property but, that is simply not true.²² In the event of a default, under the terms of the deed of trust and under Idaho Code §45-1501 et seq., Washington Trust Bank, as a creditor, would have the right to foreclose the deed of trust. Once the foreclosure against the Ryan Bowman interest was

²²See Reply Brief of Respondent, p. 6, filed February 25, 2009.

completed, Washington Trust Bank would have the right to seek a partition action pursuant to Idaho Code §6-501 and, ultimately, force the property to be sold in order to satisfy the amounts which were improperly advanced.

C.

THE EXERCISE OF STATUTORY POWERS AS TRUSTEE ARE STILL SUBJECT TO THE FIDUCIARY DUTIES OWED TO ALL BENEFICIARIES.

Washington Trust Bank will argue that its actions are authorized by the terms of the testamentary trust, as well as the statutory powers of a trustee codified at I.C. §68-106. There is no specific authority in the Last Will and Testament of Althea Lorraine Bowman which would allow a trustee to mortgage or encumber trust assets.²³ The only specific provision of the Will which could possibly be construed to allow for encumbering trust assets would be provision 10 of Article VI(a) which provides:

“Loan trust funds to any income beneficiary to assist such beneficiary in any financial emergency which may confront him or which he cannot meet from his own resources.”²⁴

However, WTB has made it very clear that the advancements to Ryan Bowman were not of trust funds, but were instead monies from Washington Trust Bank, Private Banking and; therefore, this

²³See Last Will and Testament of Althea Lorraine Bowman attached to Affidavit of Susan Kuzma, filed January 14, 2008.

²⁴*Id.*

provision is not applicable to the actions taken.²⁵ The only possible authority for actions taken by WTB is the invoking of the statutory powers of a trustee under I.C. §68-106.

The District Court in granting summary judgment identified the statutory powers of a trustee under I.C. §68-106(c); however, the District Court committed error by failing to recognize that those powers are to be exercised only with “due regard to the trustee’s obligations as a fiduciary”. See I.C. §68-106(b). The District Court concluded that I.C. §68-106(c)(7) and (c)(18) empower a Trustee to borrow money to be repaid from trust assets and to mortgage and encumber a trust asset.²⁶ While I would agree with the District Court that the code section does provide that power, it can only be exercised with due regard to the trustee’s obligation as a fiduciary. I.C. §68-106(b). A trustee must act in its fiduciary capacity at the time it is exercising its powers, and in this instance, where the trustee owes duties to more than one beneficiary, the trustee must act taking into consideration the interests of all the beneficiaries. See I.C. §68-506. At the time the Trustee executed the Promissory Note and Deed of Trust, the Trustee was not acting on behalf of any beneficiary, but instead was acting on behalf of the bank and in direct conflict with the interest of the beneficiaries.

²⁵Deposition of Susan Kuzma, p. 38, attached to Affidavit of Peter Smith, filed January 29, 2009.

²⁶Tr. p.63, L. 8-12.

D.

**THE ENCUMBRANCE OF THE UNDERLYING PROPERTY VIOLATES
ARTICLE V OF THE TESTAMENTARY TRUST**

Article V of the Last Will and Testament of Althea Lorraine Bowman states:

Article V.
Protective Provisions

Neither the income nor principal of any trust created by this instrument shall be alienable by any beneficiary, whether by assignment or by any other method, and shall not be subject to be taken by his creditors or by any representative thereof, by any process whatever, including, but not limited to, proceedings in bankruptcy. This provision shall not limit the exercise of any power of appointment or the right to disclaim.²⁷

Washington Trust Bank, by enabling Ryan Bowman to continually obtain advances beyond his “share” of the net income violated the protective provision of Article V. Effectively, the trustee enabled Ryan Bowman to encumber the principal of the trust.²⁸ The trustee has now allowed Washington Trust Bank, Private Banking, to encumber assets of the trust as a creditor in violation of the testamentary trust.²⁹ A genuine issue of material fact remains as to whether or not Washington

²⁷See Last Will and Testament of Althea Lorraine Bowman attached to Affidavit of Susan Kuzma, filed January 14, 2008.

²⁸Deposition of Susan Kuzma, p. 40, attached to Affidavit of Peter Smith, filed January 29, 2009.


²⁹*Id.*

Trust Bank violated the terms of the Last Will and Testament by advancing money to the Ryan Bowman Trust and, ultimately, securing that “loan” with a Deed of Trust thereby encumbering an undivided interest in the principal property comprising the trust all in violation of the Protective Provision of Article V.

CONCLUSION

In conclusion, Washington Trust Bank, as trustee of the Althea Lorraine Bowman Testamentary Trust owed fiduciary duties of loyalty and impartiality to all four of the beneficiaries. Whether or not Washington Trust Bank breached those fiduciary duties at the time of advances to Ryan Bowman, at the time they decided to sell the trust property, or later when they secured the repayment of a loan by taking a interest in the trust property are questions of fact which preclude entry of summary judgment. The District Court committed error by entry of summary judgment.

Respectfully submitted this 23 day of August, 2011.



J. T. DIEHL, Attorney for Appellants

CERTIFICATE OF DELIVERY

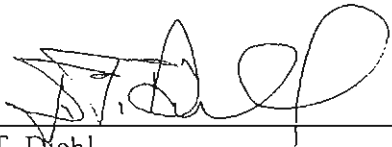
24 I hereby certify that a true and correct copy of the foregoing document was served this day of August, 2011, by:

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addressed to:

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J. T. Diehl